Supreme Court, U.S.
FILED
MAY 27 1999
CLERK

No. 98-818

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1998

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HAROLD F. RICE,

*Petitioner,*

v.

BENJAMIN J. CAYETANO, ET AL.

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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# BRIEF OF *AMICI CURIAE*, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES

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WALTER R. SCHOETTLE, ESQ.
Attorney-at-law
Suite 400
Seven Waterfront Plaza
500 Ala Moana Blvd
P. O. Box 596
Honolulu, Hawaii 96809
Tel. (808) 537-3514

*Counsel of Record for The Hou Hawaiians and Maui Loa*

1788

## TABLE OF CONTENTS


TABLE OF AUTHORITIES . . . . . ii

I. Interest of Amici. . . . . 1

II. Summary of the Argument. . . . . 3

II. Argument. . . . . 4

A. Definition of "native Hawaiian" in HHCA and Admissions Act is not a racial classification. . . . . 4

B. OHA does not represent "native Hawaiian" beneficiaries to the § 5(f) trust. . . . . 8

IV. Conclusion. . . . . 12

## TABLE OF AUTHORITIES

**Cases:**


*The Hou Hawaiians v. Cayetano,* C.A. No. 98-15402 (9th Cir.) . . . . . 3

*Price v. Akaka,* 3 F.3d 1220, (9th Cir.1993), *cert. denied,* 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994) . . . . . 3

*Price v. Akaka,* 928 F.2d 824, 828 (9th Cir.), *cert. denied*, 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991) . . . . . 3

*Price v. Department of Justice,* C.A. No. 80-2794 (D.D.C.) . . . . . 2

*Price v. Hawaii*, 921 F.2d 950 (9th Cir. 1990) . . . . . 3

*Price v. Hawaii,* 939 F.2d 702 (9th Cir.1991), *cert. denied,* 503 U.S. 938, 112 S.Ct. 1480, 117 L.Ed.2d 622 (1992) . . . . . 3

*Price v. State of Hawaii,* 5 F.3d 539 (9th Cir. 1993) . . 3

*Price v. State of Hawaii*, 764 F.2d 623, 625-626 (9th Cir. 1985), *cert.den.* 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986) . . . . . 3

*Rice v. Cayetano*, 146 F.3d. 1075, 1079 (9th Cir. 1998) . . . . . 4

*State v. Zimring,* 58 Haw. 106 (1977) . . . . . 5




**Statutes:**


Haw. Const., Art. XII, § 4 . . . . . 9

Haw. Const., Art. XII, § 5 . . . . . 9

Haw. Const., Art. XII, § 6 . . . . . 9

H.R.S., § 10-2 . . . . . 9

H.R.S., § 10-5(1) . . . . . 9

H.R.S., § 10-13.5 . . . . . 9

H.R.S., § 13D-1 . . . . . 8

H.R.S., § 13D-3(b)(1) . . . . . 8

Hawaii Admissions Act, Pub.L.No. 86-3, 73 Stat. 4 (1959), § 5(f) . . . . . 1-4

Hawaii Admissions Act, § 4 . . . . . 3, 7

Hawaiian Homes Commission Act, 1920, Pub.L. 67-34, 42 Stat. 108 (1921), § 201(a)(7) . . . . . 2


**Treatises:**


*A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians,* Hawaii Advisory Committe to the U.S. Commission on Civil rights, December 1991 . . . . . 11

Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974) . . . . . 5, 6

Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961) . . . . . 5

Faludi, Susan C., "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal,* September 9, 1991, p. 1 . . . . . 11

*Final Report on the Public Land Trust,* Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December, 1986 . . . . . 11

Fuchs, Lawrence H., *Hawaii Pono: A Social History,* Harcourt, Brace & World, Inc., New York (1961) . . . . . 7

Fundamental Law of Hawaii (1904) . . . . . 5

*Hawaiian Homes Commission,* U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992 . . . 11

*Management and Financial Audit of the Department of Hawaiian Home Lands,* Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993 . . . . . 11

*Progress Report on the Implementation of Recommendations of the Federal-State Task Force,*



Office of the Governor of the State of Hawaii, January, 1992 . . . . . 11

Wright, Theon, *The Disenchanted Isles,* The Dial Press, New York (1972) . . . . . 5

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**BRIEF OF *AMICI CURIAE*, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES**

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

## I. INTEREST OF AMICI.

The Hou Hawaiians are a native Hawaiian Ohana (tribal body or extended family group), which have been advocating the interests of native Hawaiian applicants for Hawaiian homestead lands and entitlements under § 5(f) of the Hawaii Admissions Act[1], before courts, legislatures and administra-

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[1] Section § 5(f) of the Hawaii Admissions Act provides as follows:

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public

tive agencies, since 1975. THE HOU HAWAIIANS were founded in that year, by their chief, MAUI LOA, born Doctor Nui Loa Price.

Chief MAUI LOA is a well known ethnic artist and craftsman who, together with his deceased father, Kamuela Price, has spent much of his time over the past 24 years advocating justice for native Hawaiian people. He is a "native Hawaiian" of 50 percent aboriginal blood, as defined in § 201(a)(7) of the Hawaiian Homes Commission Act (H.H.C.A.) and § 5(f) of the Hawaii Admissions Act, and has been a registered applicant with the Hawaii State Department of Hawaiian Home Lands (DHHL) for a Hawaiian homestead allotment, since 1974.

*Amici* are responsible for the establishment of the Federal--State Task Force on the Hawaiian Homes Commission Act, in 1983, as part of the settlement of *Price v. Department of Justice*, C.A. No. 80-2794 (D.D.C.), in the United States

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improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university."

73 Stat. 6.

Section § 201(a)(7) of the Hawaiian Homes Commission Act, 1920, defines the term "native Hawaiian" as follows:

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

42 Stat. 108.



District Court for the District of Columbia. Kamuela Price was appointed by then Gov. George Ariyoshi, as a member of the Task Force. Through the efforts of the Task Force some 30,000 acres of homelands which had been appropriated for other uses by the State were returned to the jurisdiction of DHHL.

*Amici* have appealed seven times to the U.S Court of Appeals from dismissal of five suits filed in the United States District Court for the District of Hawaii against the State of Hawaii and various state officers to enforce the rights of native Hawaiians conferred by Congress in §§ 4 and 5(f) of the Hawaii Admissions Act. These cases are: *Price v. State of Hawaii*, 764 F.2d 623, 625-626 (9th Cir. 1985), *cert.den.* 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986) (*Price I*); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir.), *cert. denied*, 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991), appeal after remand, 3 F.3d 1220, (9th Cir.1993), *cert. denied*, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994); *Price v. Hawaii*, 921 F.2d 950 (9th Cir. 1990); *Price v. Hawaii*, 939 F.2d 702 (9th Cir.1991), *cert. denied*, 503 U.S. 938, 112 S.Ct. 1480, 117 L.Ed.2d 622 (1992) appeal after remand, 5 F.3d 539 (9th Cir. 1993); *The Hou Hawaiians v. Cayetano*, C.A. No. 98-15402 (9th Cir.).

*Amici* respectfully submit this brief to address the issues of the case from the point of view of the "native Hawaiian" beneficiaries of the § 5(f) trust, who are not adequately represented by any of the parties to the case.

## II. SUMMARY OF THE ARGUMENT.

A. The classification of "native Hawaiians" as beneficiaries to the Hawaiian Homes Commission Act and § 5(f) trust is not a racial classification. It is a classification based upon kinship to a group of people who were unjustly and wrongly deprived of their one-third undivided interest in 1.4 million

acres of land title to which is now held by the State of Hawaii.

B. The Office of Hawaiian Affairs represents Hawaiians, ninety percent of whom are not "native Hawaiians." As a result of this conflict of interest, OHA has wrongfully accumulated over $300 million of § 5(f) trust income intended by Congress to be used for the betterment of the condition of "native Hawaiians" while it has wrongfully been trying to change the definition of "native Hawaiian" to include all Hawaiians.

The premise upon which the Ninth Circuit based its decision is false. OHA does not represent the "native Hawaiian" beneficiaries of H.H.C.A and the § 5(f) trust. There is no identity of interests between the voters for OHA trustees and the beneficiaries of the § 5(f) trust.

## III. ARGUMENT.

### A. Definition of "native Hawaiian" in HHCA and Admissions Act is not a racial classification.

Petitioner has attacked the restriction of voter eligibility as being an unconstitutional racial classification in violation of the Fifteenth and Fourteenth Amendments to the United States Constitution. The Court of Appeals agreed that the provisions in the Hawaii Constitution establishing OHA and the voter qualifications contained in H.R.S., § 13D-3 "contain a racial classification on their face." *Rice v. Cayetano*, 146 F.3d. 1075, 1079 (9th Cir. 1998).

Since these classifications are derived from the definition of "native Hawaiian" contained in § 5(f) and H.H.C.A., it might be inferred therefrom that these latter provisions also contain racial classifications on their face. *Amici* respectfully submit that this is not the case.

The classification of "native Hawaiians" as beneficiaries to the Hawaiian Homes Commission Act and § 5(f) trust is



not a racial classification. It is a classification based upon kinship to a group of people who were unjustly and wrongly deprived of their one-third undivided interest in 1.4 million acres of land title to which is now held by the State of Hawaii.

In 1778, upon arrival of Capt. James Cooke in the Sandwich Islands the native Hawaiian population exceeded 300,000. Wright, Theon, *The Disenchanted Isles,* The Dial Press, New York (1972), p. 68. It is generally accepted that there was then in existence a feudal type of land ownership system, in which all of the land was owned by the King and granted by him to his chiefs known as *konohikis*, and by them in turn to the tenant farmers. *See* Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974), p. 1.

Even then, it could not be considered a true feudal system, as the tenants were considered to have "rights" with respect to the land. This was recognized in the first Constitution of the Kingdom of Hawaii adopted in 1840. As provided therein:

> "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, *though it was not his own private property. It belonged to the chiefs and the people in common,* of whom Kamehameha I was the head, and had the management of landed property."

*State v. Zimring*, 58 Haw. 106, 111 (1977) quoting Fundamental Law of Hawaii (1904) at 3 quoting The Constitution of 1840.

This shows that the King held title merely as trustee for the use and benefit of the beneficiaries, the *konohikis* and

people.

On December 10, 1845, the Board of Commissioners to Quiet Land Titles, commonly known as the Land Commission was established to adjudicate and settle disputes over titles of real property. Cannelora, *supra,* p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the ownership of the land at that time was held in equal one-third undivided interests by the King, the *konohiki* landlords and the tenants living on the land. Cannelora, *supra*, pp. 10, 12. *See also Thurston v. Bishop,* 7 Haw. 421, 430 (1888).

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem the King and *konohikis* divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the King and 245 *konohikis* made between January 27, 1848 and March 7, 1848, which allowed the *konohiki* to take his or her claim to the Land Commission and obtain title to the land subject to the rights of the native tenants. Cannelora, *supra,* p. 13.

Native tenants were not able to obtain title to their interests until 1850, when legislation was enacted allowing them to present *kuleana* claims to the Land Commission. Cannelora, *supra,* 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the *konohiki* class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims, while *konohikis* were given up to 49 years. Cannelora, *supra*, p. 19. Third, native tenants were required to incur the considerable expense of a survey of their claim, while *konohikis* were not. *Id.* As a result, only approximately 28,000 acres of land—far less than the one-third interest that had previously been recognized—was awarded to native tenants under this provision. Fuchs, Lawrence H., *Hawaii Pono: A Social History,* Harcourt, Brace & World, Inc., New York (1961), p. 257.



Thus, this provision purportedly to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of Hawaiian people who failed to go through the process of surveying and registering *kuleana* claims. As a result, by 1920, native Hawaiians were "a landless people in the country of their forefathers." Sen. Doc. No. 151, 75th Cong., 3d Sess, Serial Set 10247 (Jan. 5, 1938), pp. 81-83. While the government held 1.8 million acres of land, an undivided one-third interest in which had once belonged to native tenants who had failed to perfect their claims under the *kuleana* law.

In order to redress this injustice and rehabilitate the native Hawaiian people, Congress enacted the HHCA. By this act, approximately 200,000 acres of land, designated "available lands", were set aside to be awarded to native Hawaiians as 99-year leasehold homesteads at a rental of one dollar per year. Upon Statehood, § 4 of the Admissions Act required the State to adopt H.H.C.A. as part of its constitution and imposed the § 5(f) trust in favor of "native Hawaiians", in part, upon 1.4 million acres of land ceded to the state.

That the classification is not a racial one can be seen simply by changing the date and place contained in the definition of "native Hawaiian". Would it be a racial classification to define "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to *1978*? Clearly,

not. Would it be a racial classification to define "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the British Islands previous to 1066? Clearly, not.

The definition was crafted in a way to compensate the heirs of those people who had lost their land when a Western legal system was imposed upon them against their will. The definition does not include Tahitians or Samoans, or other people of the Polynesian race who were not inhabitants of the Hawaiian Islands at the time that Captain Cook arrived upon their shores.

The benefits conferred by H.H.C.A. and the § 5(f) trust upon "native Hawaiians" are no more a racial classification than the law providing compensation to Japanese internees during World War II.

Petitioner can properly be excluded from the class of beneficiaries to H.H.C.A and special beneficiaries of § 5(f) because he is not a descendant of not less than one-half part of the blood of the owners of an undivided one-third interest in the trust corpus prior to 1778.

**B. OHA does not represent "native Hawaiian" beneficiaries to the § 5(f) trust.**

Concluding that the definition of "native Hawaiian" in H.H.C.A. is not a racial classification does not dispose of Petitioner's claim of entitlement to vote for OHA trustees. He also claims to be deprived of equal protection of the law in violation of the Fourteenth Amendment. The state attempts to justify this classification by arguing that there is an identity between the electors and beneficiaries of the trust and that Petitioner has no interest in the management or disposition of the trust funds. The Court of Appeals agreed with the State.

As provided by H.R.S., §§ 13D-1 and § 13D-3(b)(1), the



trustees of the Office of Hawaiian Affairs are elected by "Hawaiians." On their face, these provisions do not preclude Petitioner from voting for OHA trustees, because H.R.S., Chapter 13 does not define the term "Hawaiian." Under the common meaning of the word, Petitioner certainly would qualify as "Hawaiian" since he was born in Hawaii and lived there all of his life.

But, since H.R.S., Chapter 13 deals with the election of trustees of OHA, and since H.R.S., Chapter 10 also deals with the Office of Hawaiian Affairs, the definition of "Hawaiian" in H.R.S., § 10-2 has been applied to exclude Petitioner from registering to vote for OHA trustees. All of the parties agree that the definition of "Hawaiian" in § 10-2 applies to § 13D-3(b)(1). Thus, Petitioner has been denied the right to vote, because, although his ancestors have lived in Hawaii for many years they did not arrive prior to 1778.

The Court of Appeals held that this discrimination does not run afoul of the Fourteenth and Fifteenth Amendments to the United States Constitution because voting is restricted to the beneficiaries of the trust.

However, while OHA trustees are elected by "Hawaiians" without regard to the 50% blood quantum, they have been entrusted with the management and disposition of a large portion of the income from the § 5(f) trust with the mandate that it be used for the betterment of the condition of "native Hawaiians". H.R.S., §§ 10-5(1), 10-13.5, 10-2; Haw. Const., Art. XII, §§ 4, 5 and 6.

Further, "native Hawaiians" comprise only approximately 10 percent of the total number of "Hawaiians", while the income from the § 5(f) trust is the primary source of funding for OHA. Thus, the constitutional and statutory scheme establishing OHA has created a conflict of interest on the part of the OHA trustees which is, in itself, a breach of the

§ 5(f) trust. Ninety percent of the "Hawaiians" who elect OHA trustees are not beneficiaries of the § 5(f) trust, but would like to be. Therefore, from its inception, OHA's goal has been to change the definition of "native Hawaiian" in order to include all "Hawaiians."

"Hawaiians" argue that they have been discriminated against and that Congress has imposed an "arbitrary" 50% blood quantum and that they have just as much right to participate in the benefits of the § 5(f) trust as "native Hawaiians."

Suppose wolves were an endangered species and Congress had given the state of Virginia 1.4 million acres of land in trust to provide habitat and funding to preserve them. If Virginia installed the American Kennel Club as trustees of this land and they, in turn, proposed that the definition of wolf be changed to include all breeds of domestic dogs, it would be a clear breach of trust. OHA is doing the same thing. OHA wants a person who is one-half Filipino, one-quarter Japanese, one-eighth Caucasian, one-sixteenth Chinese and one-sixteenth Hawaiian to be given the same benefits as a person who is one-half Hawaiian. How can such a person make a claim to participate as an equal beneficiary with a person who is one-half Hawaiian?

The classification in H.H.C.A. is not discriminatory because, as noted above, it is one of degree of kinship to the former owners of the land who were unjustly and wrongly deprived of their one-third undivided interest. Statutes of intestate inheritance in every state provide for the distribution of property based upon a person's degree of kinship to the decedent. This is not a discriminatory classification.

Rather, many "native Hawaiians", including *Amici*, consider OHA's efforts to change the beneficiaries to be a breach of the § 5(f) trust. While OHA has been pursuing this



course, it has not been using the trust income for the betterment of the condition of the beneficiaries. Instead, OHA has wrongfully accumulated over $300 million in income from trust § 5(f) waiting for the day that they can change the definition of "native Hawaiian" to include all "Hawaiians". At this very moment OHA is negotiating with the State for hundreds of millions of additional dollars of § 5(f) income and land. When *Amici* suggested that some of this money be used to provide compensation for the elderly native Hawaiian beneficiaries who have been denied homesteads for 40 years or more, OHA would not even consider it.

Meanwhile, native Hawaiian beneficiaries are being denied homesteads because of an alleged lack of funding to provide infrastructure for the development of homesteads. Numerous reports have been published documenting the State's continued breach of trust by failing to develop the available lands and distribute homesteads. *Final Report on the Public Land Trust,* Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December, 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians,* Hawaii Advisory Committee to the U.S. Commission on Civil rights, December 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force,* Office of the Governor of the State of Hawaii, January, 1992; *Hawaiian Homes Commission,* U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands,* Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993. Indeed, the State's continued breach of trust was the subject of a major front page newspaper article in the *Wall Street Journal*. Faludi, Susan C., "Broken Promise: How Everyone

Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal,* September 9, 1991, p. 1.

In theory, it should make no difference how OHA trustees are selected, whether by appointment or election. If elected, it should not make any difference who is entitled to vote. No matter how the trustees obtained their office they are theoretically bound by the fiduciary duty of absolute loyalty to the "native Hawaiian" special beneficiaries of the § 5(f) trust.

However, this duty has meaning only so far as beneficiaries are able and courts are willing to enforce it. Unfortunately, the Court of Appeals has not so far seen fit to take any action to enforce the § 5(f) trust, while the native Hawaiian beneficiaries continue to suffer.

## IV. CONCLUSION.

Based on the foregoing argument and authorities, THE HOU HAWAIIANS and Chief MAUI LOA respectfully suggest that any constitutional or statutory provision allowing for the election of trustees of income from the § 5(f) trust intended to be used for the betterment of the condition of native Hawaiians must limit the qualifications for voters to native Hawaiian beneficiaries themselves, as defined in H.H.C.A. and § 5(f) of the Hawaii Admissions Act.

Dated: Honolulu, Hawaii, May 27, 1999.

Respectfully submitted,
WALTER R. SCHOETTLE,
Counsel of Record for *Amici Curiae*, THE HOU HAWAIIANS and MAUI LOA